



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT MERU
ELECTION PETITION NO. 1 OF 2013

JOHN MBAABU MURITHI PETITIONER

VERSUS

JACOB MWIRIGU MUTHURI 1ST RESPONDENT

LUCY MBITHI R/O BUURI CONSTITUENCY 2ND RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION 3RD RESPONDENT

RULING

John Mbaabu Murithi hereinafter called the petitioner filed this petition on 4th April, 2013 contesting the outcome of Kibirichia Ward representative on grounds of irregularities alleged to have been committed during counting and/or tallying of votes. On the 21st May, 2013 before the petition could be set down for hearing the petitioner took out a notice of motion under Rule 32 part IV of the Elections parliamentary and county Elections) petitions rules 2013 seeking the following main order.

“The honourable court be pleased to order scrutiny and recount of all ballot papers within Kibirichia ward.”

The application is based on the grounds that the main prayer in the petitions is that of recount of votes. That a thorough scrutiny of forms 35 provided by the 3rd respondent show discrepancies in tallying on paper that the 1st respondent won by a margin of 28 votes which is doubtful. Further he urged that recount and scrutiny will save judicial time and that no party will be prejudiced by the orders sought. The advocate for the petitioner urged that the main prayer in the petition was for recount of votes. The application is further supported by an affidavit filed by the petitioner sworn on the 20th May, 2013. In paragraph 11 of his affidavit the petitioner has enumerated instances of discrepancies in the polling stations. In summary they are as follows;

- (a) Form 36 Declaration of results was signed on 4th March, 2013 before counting.
- (b) In Form 35 for Ntharagwene Primary school was solely filed and signed by the 2nd respondent without any agents.
- (c) In Form 35 for Nthimbiri Primary school results do not tally and the results are altered without any counter signing.

- (d) In form 35 for Naari Primary School the entries for the petitioner are altered.
- (e) In Form 35 for Ntugi Primary School entries do not tally as one vote is missing.
- (f) In form 35 for Gakando Primary School the entries do not tally as 2 votes are missing/or unaccounted for.
- (g) In form 35 for Kiborione the total number of votes cast is altered without counter signing.
- (h) In form 35 for Murinya results for John Mbaabu Murithi are altered and/or changed. Entries do not tally.
- (i) In form 35 for Murinya stream 1 the entries do not tally.
- (j) In Form 35 for Rugusu Primary School the entries do not tally.
- (k) Form 35 for Gathuine Primary school shows that rejected votes was unknown .
- (l) In form 35 for Mburugiti Primary School the entries do not tally. 3 votes are missing and only 2 agents signed the form.
- (m) In form 35 for Ruibi Primary School entries do not tally as 3 votes are missing or unaccounted for.
- (n) In form 35 for Kibirichia Primary School the entries do not tally as 3 votes are missing or unaccounted for.
- (o) In form 35 for Kibirichia Market the number of disputed votes was initially indicated as 9 but later changed to none unofficially. 2 votes are unaccounted for.
- (p) In form 35 for Mujujune Market the alterations by pen are unofficial. The entries do not tally.

The petitioner has further deponed that there was a sharp difference between the original form 35 left with agents and that produced by the 3rd respondent. He annexed the 2 forms for Kibirichia Girls' secondary polling station as exhibits.

The petitioner further depones that counting clerks could not differentiate between Jacob Mwirigi Muthuri and Lazaru Mwirigi and the respondent could have gotten undue advantage.

The petitioner relied on a number of High court decisions including the following:-

- High Court Nairobi Election Petition No. 5 of 2008
- High Court Nairobi Election Petition No. 7 of 1983
- High Court Nairobi Election Petition No. 5 of 1983
- High Court Nairobi Election Petition No. 6 of 1988
- High Court Nairobi Election Petition No. 1 of 2008

The petitioner through his advocate urged that Rule /Parliamentary and County Elections) Petition Rules 2013 herein after called '**Election Petition Rules 2013**' gives court wide powers to order scrutiny and recount. The petitioner urges that the court be pleased to make appropriate orders for recount and tallying of the votes.

The advocate for the 1st respondent opposed the application. He relied on a replying affidavit sworn by the 1st respondent on the 28th May, 2013 and filed in court on the same day. His main argument was that

the court is yet to hear evidence and have it tested by way of cross examination. That issues for determination are yet to be set as the pretrial conference has not been conducted. That a recount as envisaged under Rule 32 of the Election Petition Rules 2013 can only be done where recount is the only prayer in the petition. That the petitioner has sought 4 prayers in the petition and none of them is for scrutiny. That recount and scrutiny can only be done where hearing has commenced. That the court should not be swayed by the thin margin between the petitioner and the 1st respondent as it does not matter whether it is by one or more votes. That in all the case law cited evidence was led before a recount and/or tallying was ordered. That in the case of **Ali Hassan Joho v Nyoge & another Mombasa High court Election Petition No. 1 of 2005** relied only the petitioner, the Electoral Commission admitted that a recount was necessary. The petitioner is on a fishing expedition and so the application should be dismissed.

The advocate for the 2nd and 3rd respondents equally opposed the application. He relied on ground of opposition dated 30th May, 2013 and filed in court on the 31st May, 2013. He equally urged that Rule 32 of the Election Petition Rules 2013 presupposes a recount in a situation where the only issue before court is for recount and/or tallying. That the petition herein contains allegations beyond those envisaged under Rule 32 of the Election Petition Rule 2013. Scrutiny has not been sought in the main petition. The allegations set out to the petition have not been proved and so the application is premature. That Section 82 of the Elections Act 2011 presupposes that a hearing has taken place before an application for scrutiny and recount is made. That a good reason ought to be given before ordering scrutiny and/or recount. No proper basis has been laid to warrant order for scrutiny and recount. The advocate for the 2nd and 3rd respondent relied on a number of authorities including the following:-

- High Court Nairobi Election Petition No. 9 of 1993
- High Court Nairobi Election Petition No. 41 of 1993
- High Court Nairobi Election Petition No. 13 of 2008
- Halbury's Laws of England, Tenth Reissue Vol. 15

I have carefully listened to the submissions by the advocate for the petitioner and the respondents'. I have read and considered the authorities cited in support of their respective contentions. I have in equal measure considered the pleadings filed by the respective parties. The issue before me is whether this court can order scrutiny and recount of the votes at this stage as sought by the petitioner. Though it has been contended by the respondents that the petitioner sought other prayers other than that sought in this application I have examined the petition and I note that the petitioner's main prayer is for recount of all votes from all polling stations within Kibirichia Ward. Though there are other prayers in the petition they appear to follow from the primary one and would obviously flow were he to succeed in the main prayer. It is true as submitted by the respondents that there is no prayer for scrutiny. In my view having examined the pleadings, should the court order for a recount then scrutiny would automatically follow as it would be ridiculous in the circumstances to proceed with a recount without scrutiny.

Section 82(1) of the Elections Act 2011 provides:-

82(1) "An election court may on its motion or on application by any party to the petition, during the hearing of an election petition order for scrutiny of votes to be carried out in such manner as the election court may determine"

Rule 32(1) of the Election (parliamentary and county Election) petition Rule 2013 provides:

32(1) where the only issue in the election petition is the count or tallying of the votes received by the candidates the petitioner may apply to the court for an order to recount the votes and examine the tallying"

Rule 33(1) of the Election petition Rules 2013 provides:

"the parties to the proceedings may at any stage apply for scrutiny of the votes for purposes of establishing the validity of the votes cast." (emphasis added)

Rule 33(2) provides:

“Upon the application under sub rule is the court may if it is satisfied that there is sufficient reason order for scrutiny or recount of the votes”

I have noted however that the petitioner’s advocate did not cite Rule 33 of the Election Petition Rules 2013 in the body of the application. Rule 33 specifically deals with scrutiny of votes. Rule 33(2) of the Rules indicates that the court can either order scrutiny or recount. The words are used interchangeably. Failure to cite Rule 33(1) on the body of the application in my view is a technical error and therefore not fatal to the application. See Order 51 Rule 10 of the Civil Procedure Rules and Article 159 2(d) of constitution.

it is trite law from the reading of the authorities cited by all the parties that an order for scrutiny is not automatic. There has to be a good reason before the court can order for scrutiny. The order should be geared towards achieving just and speedy results in an election petition.

Though the respondents argued that the court has to hear witnesses before it can make an order for scrutiny or recount, Rule 33(1) of the Election Petition Rules 2013 clearly indicate that an application for scrutiny can be made at any stage of the proceedings. The only rider is that sufficient reason must be shown before such order is made. In this petition allegations have been made by the petitioner and most of them have been controverted by the respondents. The court would need to have the evidence tested by way of cross-examination should the parties insist on hearing by way of viva voce evidence.

I have however noted that the petitioner, the 1st respondent and 2nd respondent have all annexed sets of forms 35 from various polling stations within Kibirichia Ward the subject of this petition. From a casual reading of the various forms 35 annexed, I have noted various alterations, a good number of which are not counter-signed and stamped. These documents were provided by the 3rd respondent and there has been no suggestion whatsoever that the petitioner tampered with them. In a few of the forms 35 I noted that the entries do not tally. The allegation by the petitioner that Form 35 for Kibirichia Girls Secondary polling station given to his agent differs with the one provided by the 3rd respondent is not controverted.

Though no witness is yet to be heard Forms 35 provided to this court by the parties form part of the evidence. The forms speak for themselves. The petitioner alleges in his affidavit that as a result of numerous allegations touching on counting and tallying the 1st respondent benefited and was consequently declared the winner. The burden of proof of such allegations obviously falls squarely on the petitioner. He will have to prove that such irregularities were of such a magnitude that they substantially and materially affected the outcome of the election for Kibirichia Ward representative. The irregularities may be such that they do not affect the will of the voters in Kibirichia ward. In my finding on order of scrutiny will assist the court to determine the truth. The court is under a duty to investigate the truthfulness or otherwise of all allegations made by the petitioner. I find that scrutiny and recount of the ballots would assist in this regard. In the case of William Maina Kamandea v Margaret Wanjiru Kariuki & 2 others. Nairobi Election Petition No. 5 of 2008 Justice P.K. Kariuki held:

“It is now well established that an order of scrutiny can be made at any stage of the hearing before final judgment whether on the courts own motion or if a basis laid requires so. It can be made if it is prayed in the petition itself or when there is ground for believing that there were irregularities in the election process or if there was a mistake or mistakes on the part of the returning officer and other election officials”

In Halbury’s Laws of England Fourth Edition Reissue volume 15 page 622 (an extract cited by advocate for 2nd and 3rd respondents in paragraph 846 it is provided:-

“if an application for recount is granted, the usual practice is to order the recount to be taken before the trial by or officer appointed on the purpose”

For the foregoing reasons I am persuaded that the petitioner has laid a basis for an order of scrutiny and recount and that it would be in the interest of justice in the circumstances of this case that I allow the application . I hereby direct that all documents and materials to be delivered to court by the 3rd respondent pursuant to Rule 21 of the Election Petition Rules 2013 shall be scrutinized. In particular the following documents to be scrutinized;

- a. Any written statement made by presiding officers.
- b. Any written complaints of the candidates and their representations
- c. Pockets of spoilt papers
- d. Counted ballot papers
- e. Rejected ballot papers
- f. Any statement showing the number of rejected ballot papers.
- g. Original forms 35 and 36 and any statutory forms in respect to Kibirichia Ward that are in possession of 2nd and 3rd respondents.

The orders herein shall be effected under my supervision and/or an officer appointed by me.

D.O. Onyango

AG. SENIOR PRINCIPAL MAGISTRATE

04.06.2013

04.06.2013

Before D. O. Onyango, Ag. SPM

Kirimania – court clerk

1st respondent – present

2nd respondent – present

3rd respondent – absent

Nyamburi for 2nd and 3rd respondents

Ondari for petitioner

Mureithi h/b for Mwanzia for 1st respondents.

COURT

Ruling read and delivered in open court in the presence of the above quoram.

D.O. Onyango

AG. SENIOR PRINCIPAL MAGISTRATE

04.06.2013

NYAMBURI

I pray that we consult on where the ballot boxes will be kept and on other issues.

MUREITHI

We can have file placed aside.

ONDARI

We can come up at 2 p.m.

COURT

Court file placed aside till 2 p.m. to allow the advocates for the parties to consult.

D.O. Onyango

AG. SENIOR PRINCIPAL MAGISTRATE

04.06.2013

LATER AT 2.45 P.M.

Coram as before save that Mr. Mwanzia for 1st respondent now present in person

Ondari for petitioner

Nyamburi for 2nd and 3rd respondents

MWANZIA

My client prays for leave to appeal against the delivered the Ruling delivered earlier today. We also pray for copies of typed proceedings. I pray for stay of proceedings as I pursue the appeal.

D.O. Onyango

AG. SENIOR PRINCIPAL MAGISTRATE

04.06.2013

ONDARI

I am surprised as my colleague never intimated his intentions to us. A formal application ought to be made.

D.O. Onyango

AG. SENIOR PRINCIPAL MAGISTRATE

04.06.2013

NYAMBARI

The 1st respondent has a right to appeal. I do not oppose the orders being sought. The 1st respondent however needs time lines within which to prosecute his appeal.

D.O. Onyango

AG. SENIOR PRINCIPAL MAGISTRATE

04.06.2013

COURT

I have considered the applications made on behalf of the 1st respondent. I have equally considered the response by the 2nd and 3rd respondents advocates as well as petitioners. Though the advocate for the petitioner urges that a formal application ought to be made I believe that considering the constitutional timelines within which this court ought to conclude this matter adjourning to have a formal application filed will only serve to delay the petition. I wish therefore to deal with the issues raised. The 1st respondent has a constitutional right to appeal a decision of this court. I accordingly would grant him leave as sought. I also order that typed copies of the proceedings and ruling delivered by this court be supplied to the 1st respondent's advocate upon payment of copying fees. On the issue of stay of proceedings as I already indicated this court has barely 3 months to hear and conclude this case. I am not in a position to control the pace at which the appeal, if filed, will be determined. To order stay of proceedings will most likely make it impossible for me to determine this petition within the timelines provided. I find therefore that orders of stay of proceedings will not serve the ends of justice in this court. I decline to order stay of proceedings. Should the high court however order stay of proceedings of this court then we will most humbly oblige. In the meantime the parties shall proceed with the pretrial conference as was already scheduled. Orders accordingly.

D.O. Onyango

AG. SENIOR PRINCIPAL MAGISTRATE

04.06.2013

NYAMBURI

The parties have agreed on the issues for determination.

D.O. Onyango

AG. SENIOR PRINCIPAL MAGISTRATE

04.06.2013

MWANZIA

It is true we have agreed on the issues for determination.

ONDARI

It is true we have agreed on issues for determination.

COURT

By consent the parties agree that the following issues be set down for determination:

- (i) Whether the 1st respondent was validly elected.
- (ii) whether there was anomalies in the counting and tallying of votes.
- (iii) If there were such anomalies whether they materially affected the outcome of the election.

(iv) What reliefs should the court grant in this petition.

(v) Who should bear costs of this petition.

It is further agreed by consent that:

(a) Hearing of the petition and counting/scrutiny shall commence on the 25th June, 2013 on a daily basis until conclusion.

(b) The ballot boxes shall be delivered to court on the 21st June, 2013 at 12 noon and parties advised to be present and/or be represented during such delivery.

(c) The decision to call witnesses for cross-examination or otherwise to depend on the outcome of the scrutiny and/or recount.

Signed by: Ondari for the petitioner

Nyamburi for the 2nd and 3rd respondents

Mwanzia for the 1st respondent

D.O. Onyango

AG. SENIOR PRINCIPAL MAGISTRATE

04.06.2013